Ref. No. 393

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	CASE NO. 89100204
R & C TOURS (GUAM), INC., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION FOR A PROTECTIVE ORDER AND DIRECTING RESPONDENT TO ANSWER SPECIFIED INTERROGATORIES AND REQUESTS FOR ADMISSIONS

I. Procedural History

On September 18, 1989 Respondent filed a "Motion for Protective Order" requesting the court prohibit the Complainant "from compelling Respondent from self-incrimination where the request is likely to form the basis of a criminal prosecution under 8 U.S.C. Section 274A of the Immigration and Nationality Act where criminal actions are available against employers engaged in a pattern or practice of knowingly hiring or continuing to employ unauthorized employees."

Respondent further points out in its Motion for a Protective Order that the Complainant has filed a number of discovery requests including Interrogatories, Request to Produce, and Admissions wherein Respondent made objection under the rules where it deemed appropriate. Respondent argues that its Motion for a Protective Order supplements its Fifth Amendment responses to Complainant's Discovery.

On October 6, 1989, this office received Complainant's Response in Opposition to the Motion for a Protective Order. Complainant, in general, argues that Respondent's Motion for a Protective Order should be denied because (1) there are no criminal sanctions attendant to failure to complete the Form I-9; (2) the protection against self-incrimination under the Fifth Amendment is purely personal and not available to Respondent, R and C Tours, Inc., a corporation; (3) Rule 33(a) of the Federal Rules of Civil Procedure provides that Respondent must designate someone to answer on its behalf as to "such information as is available to the party"; and (4) the discovery being sought is relevant and material.

A careful review of Respondent's responses to Complainant's Interrogatories and Requests for Admissions shows that Respondent has refused to answer some of the questions because of its alleged Fifth Amendment rights, the requests are irrelevant, burdensome, over-broad and not reasonably calculated to lead to proper discovery under the Federal Rules of Civil Procedure, and the information has been voluntarily provided to Respondent on a previous occasion and therefore the request is burdensome and repetitive.

In its responses to the interrogatories, Respondent further objected to Complainant's requirement that responses include "knowledge held by its attorneys as such is over-broad so as to include information subject to client-attorney privileged communications and attorney's work product and to such extent such information is not included in its responses."

On October 16, 1989, I directed Complainant to provide this office with copies of all discovery requests made to Respondent, and briefs on specified legal issues. On October 30, 1989, Complainant submitted the requested documents and briefs for my consideration in ruling on Respondent's objections to discovery.

On October 23, 1989, Respondent filed a Response to Complainant's October 6, 1989 response. In its response, Respondent argues that the cases cited by Complainant in response to Respondent's Motion are not applicable to the case at bar, because Complainant is requesting communicative responses from Respondent beyond the mere production of documents and the documents are being requested through discovery not a subpoena duces tecum.

I will deal with each of the objections to the interrogations raised by Respondent topically and at the conclusion provide the parties with an appropriate order and direction so that discovery can continue in an expeditious manner.

II. Legal Analysis

A. Non-Privilege Objections

1. Respondent has failed in its obligation to justify it's objections. 28 C.F.R. § 68.19(a) provides that "Unless the objecting party sustains his/her burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served."

Respondent has failed to articulate any justification for its objections. Neither "Respondent's Responses to Complainant's First Set of Interrogatories," nor its "Memorandum of

oints and Authorities In Support of Respondent's Motion for rotective Order," nor "Respondent's Reply Memorandum" state why espondent contends the interrogatories are "over-broad, burden- ome, lack relevance, and are not reasonably calculated to lead o proper discovery."

> The basic purpose of interrogatories is to discover facts under oath or learn where facts may be discovered and to narrow the issues in the case for trial. Life Music, Inc. v. Broadcast Music, Inc., 41 FRD 16, 26 (E.D. N.Y. 1966); United States v. 216 Bottles, more or less, 36 FRD 695, 701 (E.D. N.Y. 1965); United States v. Grinnel Corp., 30 FRD 358, 361 (D.R.I. 1962). If a party objects to interrogatories, the burden falls on that party to convince the court that the interrogatories are improper and need not be answered. See Rosenberg v. Johns-Manville Corp., 85 FRD 292 (E.D. Pa. 1980); In re Folding Carton Antitrust Litigation, 83 FRD 260 (N.D. Ill. 1979). Fonseca v. Regan, 98 FRD 694, 700 (1978), rev on other grounds, 734 F.2d 944 (2d Cir. 1984), cert. denied, 105 S. Ct. 249 (1984).
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> To be adequate, objections which serve as the basis of a motion for a protective order under R. 26 should be 'plain enough and specific enough so that the court can understand in what way the Interrogatories are alleged to be objectionable.' Panola Land Buyers Assn. v. Shuman, 762 F.2d 1550 (11th Cir. 1985).

Respondent's failure to adequately explain why the inter- gatories are over-broad, burdensome, lack relevance and are t reasonably calculated to lead to proper discovery makes it fficult for me in this case to sustain its objections. I will erefore review the legal principles applicable to what nstitutes an over-broad, burdensome and irrelevant interroga- ry and apply them in a common-sense approach to the discovery quest. Because Respondent has failed to articulate why the scovery requests are objectionable, I will apply a liberal proach to the discovery requests.

2. Over-broad Interrogatories

While there is no precise formula of what constitutes an ver-broad" interrogatory, objections to interrogatories on the ound that they are over-broad have been sustained where "The estions asked were so broad and comprehensive as to call for ery minute detail of the government's evidence." United ates v. Grinnel Corp., 30 FRD 358, 362 (D.R.I. 1962).

"Objections must show specifically how an interrogatory is overly broad, burdensome, or oppressive, by submitting affidavits or offering evidence which reveals the nature of the burden." Chubb Integrated Systems Ltd. v. National Bank of Washington, 103 FRD 52 (D.DC 1984).

Respondent's objections to the interrogatories do not specify or explain why the interrogatories are over-broad. Moreover, a careful review of interrogatories 2 and 11 through 15 does not convince me that they are over-broad considering the nature of the complaint filed in this case.

3. Burdensome Interrogatories

An interrogatory is not objectionable as burdensome simply because its answer requires a compilation of data from respondent's own records. United States v. 216 Bottles, 36 FRD 695 (ED NY 1963); V.D. Anderson v. Helena Cotton Oil Co., 117 F. Supp. 932 (ED Ark. 1953). An answer to such interrogatories will ordinarily be required if the interrogated party has control over the information sought. Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 64 FRD 459 (SD NY 1974); Sargent-Welsh Scientific Co. v. Ventron Corp., 59 FRD 500, 503 (ND Ill. 1973); See Shepard's: Discovery Proceedings in Federal Practice, § 7.26.

> The burden of proof is generally on the party that objects to an interrogatory. The objection of burdensomeness will therefore not be considered without some indication of why the interrogatory is difficult to answer.
> Leumi Financial Corp. v. Hartford Accident & Indem Co., 295 F. Supp. 539, 544 (1969).

Respondent has not shown why it would be unduly burdensome to answer Interrogatories 2, 11, 12, 13, 14, and 15. The type of information requested is routinely kept by similarly situated corporations.

Rule 33, Fed. R. Civ. P. provides that a party may serve written interrogatories upon . . . "a public or private corporation . . . by any officer or agent, who shall furnish such information as is available to the party." The corporation may, in the alternative, produce business records in lieu of answers.

> (c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the

> interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries . . . .

Furthermore, the mere fact "[T]hat answering interrogatories would be burdensome and expensive and would interfere with some of the defendant's business operations is not in itself a reason for refusing to order discovery which is otherwise appropriate." Board of Educ. of Evanston TP. v. Admiral Hearing, 104 FRD 23, 29 (ND Ill. 1984).

Respondent has failed to show why the answers would be unduly burdensome to provide, or that the interrogatories are otherwise inappropriate. I, therefore, find no merit to respondent's objection that the interrogatories are too burdensome.

4. Relevancy of Interrogatories

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence. Rule 401 Fed. R. Evid.

At this juncture, I am not called upon to adjudicate the admissibility of the evidence sought by the government, but merely its relevancy to the case. The scope of inquiry being developed by the government pursuant to 28 C.F.R. 68.14, et. seq., should not be diminished unless the information sought is clearly irrelevant.

Complainant in its brief states that the information sought by its interrogatories is relevant with respect to a number of issues including (1) the identification of the individuals representing or controlling the corporation which is the employer; and (2) establishment of certain statutory elements of the Section 274A I&NA violations, in particular, proof of "wages or other remuneration." 8 C.F.R. 274a.1(c), (f), (g), (h), and (j).

After carefully reviewing the interrogatories, as more fully described below, I find some of the interrogatories are relevant and others are not relevant for purposes of discovering evidence which might be needed by Complainant to prove the charges in this case.

As found in Interrogatory #2, Respondent objects to the request for listing of its Directors and Officers with their addresses and phone numbers as lacking relevancy and is not reasonably calculated to lead to proper discovery under the Federal Rules of Civil Procedure. I find the interrogatory relevant for the purpose of determining inter alia who may have been involved in directing and controlling the hiring of employees and what procedure were used, if any, to comply with the record keeping provisions of IRCA. Discovery of this information may also be important to determine what if any mitigation of penalties should be applied in this case.

Interrogatories #11 through #15 requests specified information with respect to each and every individual identified as an employee in the Complaint including their rate of pay, how they were paid, and training tools used by these employees. I do not find any of these interrogatories relevant to providing any information which would be helpful to Complainant in proving any of the charges in this complaint. I, therefore, sustain Respondent's objections to Interrogatories 11 through 15 on the grounds that they are irrelevant to a fair determination of the issues in this case.

5. Attorney/Client Privilege and/or Work Product Doctrine

Respondent asserts at paragraph two of "Respondent's Responses to Complainant's First Set of Interrogatories" that certain (undesignated) responses would encompass knowledge held by its attorneys and as such are over-broad and subject to privilege.[1]

> The attorney-client privilege protects communications between attorney and client, not facts. This privilege should be narrowly construed. Hoffman v. United Telecommunications, Inc., 117 FRD 436, 439 (D. Kan. 1987).

[1]While corporations are "clients" within the attorney-client privilege rules, the Supreme Court has instructed that there must be a case-by-case determination by the trial judge of which communications, between the attorney and employees of all levels, are necessary to securing legal counsel, and hence protected by the privilege. Upjohn Co. v. United States, 449 U.S. 383, 100 S. Ct. 677 (1981).

The court in Board of Educ. of Evanston, supra, at 32, states:

> It is settled law:
>
> that the work product concept furnishe[s] no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.
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> 8 Wright & Miller, Federal Practice and Procedure § 2023, at 194 & n.16 (1970). Thus a party may properly 'inquire into the identity and location of persons having knowledge of relevant facts.' Besly-Welles Corp. v. Balax, Inc., 43 FRD 368, 371 (E.D. Wis. 1968). But the party may not do so in a fashion that effectively infringes upon the opposing attorney's preparation for his case for trial.
> Bd. of Educ. of Evanston, Id. at 32.

In view of the fact that Respondent has not submitted to me the specific papers, documents, or memoranda which it claims are subject to the attorney/client or work product privilege, I cannot rule on its objections. I, therefore, direct Respondent to submit to me for an in camera inspection any documents, papers, or memoranda which it claims are protected by a privilege and that relates to a specific discovery request.

6. Fifth Amendment Privilege

Respondent, R & C Corporation, has asserted a Fifth Amendment right against self-incrimination in response to a significant number of Complainant's interrogatories, request to produce and request for admissions. It is clear from Respondent's briefs, however, that it is actually asserting that the 5th Amendment rights of Mr. Toyohito Yoneyama, the vice-president and general manager of R and C Corporation will be violated by his answers to certain of the interrogatories and Request for Admissions. Complainant has correctly argued that Respondent "would have the court proceed as if Mr. Yoneyama and the corporation were indistinguishable."

The Respondent in this case is a corporation, not Mr. Yoneyama, and the constitutional rights of an individual and those of a corporation with respect to discovery request are clearly different. The differences between the constitutional

rights of individuals and corporations in producing records and answering discovery requests has been frequently discussed in federal decisions. See Braswell v. United States, ____U.S.____, 108 S. Ct. 2284 (1988); Bellis v. United States, 417 U.S. 85 (1974) and United States v. Kordel, 397 U.S. 1 (1970).

These cases and others which relate to the issue of whether or not Respondent can assert its alleged 5th Amendment right and refuse to produce or answer the discovery requests in this case have been ably discussed in the briefs filed by the parties.

The Supreme Court case of United States v. Kordel, supra, describes the appointment by the corporation of an alternate agent in responding to discovery requests as an obligation stating at p. 8, the following relevant language:

> service of the interrogatories obligated the corporation to 'appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation.' The corporation could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. 'It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because he fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have.' Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.

The relevant legal principles that these cases hold which are relevant to Respondent's Motion are: (1) that the privilege against compelled self-incrimination is purely personal and cannot be utilized by or on behalf of any organization, including corporations; (2) Corporate documents may not be withheld on the grounds that the corporation will be incriminated nor may the custodian of corporate books and records withhold them on the grounds that they may personally be incriminated by their production; (3) a corporate officer can assert his 5th Amendment right and not be required to answer an interrogatory directed to a corporation, but the corporation is obliged to appoint an agent who could, without fear of self-incrimination, furnish requested information as was available to the corporation; and (4) If no agent of the corporation can answer the interrogatories or other discovery request addressed to the

corporation without subjecting himself or herself to a real and appreciable risk of self-incrimination, the court can consider issuing a protective order or the government can grant a selected representative "use immunity."

For purposes of deciding Respondent's Motion for a Protective Order, I am assuming that Respondent's counsel represents Mr. Yoneyama in his individual capacity and that Mr. Yoneyama has asked Respondent's counsel to assert on his behalf that he wants to assert his 5th Amendment right and not be compelled to answer any of the discovery requests, because to do so may tend to incriminate him. Complainant's argument that there can be no criminal sanctions attendant to failure to complete the Form I-9 does not take into account the nature and scope of its discovery requests and the variety of criminal statutes that could be used to prove a criminal violation under IRCA or Title 18 United States Code. See IRCA section 274A(f) (criminal pattern or practice); 18 U.S.C. §§ 1001, 1028, 1546 and 1621 (fraud, false attestation and other criminal code violations).

Based upon the legal principles set forth in the cases cited above and in the parties briefs, I conclude that Mr. Yoneyama has asserted his Fifth Amendment Privilege Against Compulsory Self-Incrimination with respect to Interrogatories: 3, 7, 15, and 19, and Request for Admissions: 3, 6, 9, 12, 15, 18, 21, 24, 27, 28, 29, 32, 35, 36, 37, 38, 41, 44, 47, 50, 53, 53 (sic - second #53 as Complainant erred in numbering), 56, 59, 62, 65, 66, 69, 70, 71, 72, 73, 76, 77, 80, 81, 84, 85, 86, 87, 88, 91, 92, 95, 96, 99, 100, 103, 104, 105, 106, 107, 110, 111, 114, 115, 116, 117, 120, 121, 122, 123, 126, 127, 130, 131, 134, 135, 138, 139, 142, 143, 144, 147, 148, 149, 150, 151, 154, 155, 158, 159, 162, 163, 164 through and including 203. Mr. Yoneyama does not have to answer any of these interrogatories and requests for admissions, but the Respondent is directed to appoint an agent such as another officer or employee who could, without fear of self-incrimination, furnish answers to these discovery requests.

CONCLUSION

The Respondent's Motion for Protective Order and its objections to the interrogatories and requests for admissions, except for Interrogatories 11 - 15, are hereby denied;

Based upon the foregoing, it is hereby ORDERED that:

(1) Respondent shall comply with all discovery requests, except Interrogatories 11-15, on or before December 6, 1989; and

(2) Respondent shall submit to me on or before December 6, 1989, for an in camera inspection, any and all papers, memoranda, or documents which it claims are protected by a privilege from Complainant's discovery requests.

(3) Mr. Toyohito Yoneyama does not have answer any of the interrogatories and requests for admissions wherein he asserts his 5th Amendment privilege against compulsory self-incrimination, but Respondent is directed to appoint an agent who could without fear of self-incrimination respond to all discovery requests which Mr. Yoneyama has refused to answer based upon this privilege on or before December 6, 1989.

(4) Respondent does not have to provide any documents or answers to discovery requests which it has already provided to Complainant but, if there is a dispute on whether or not the discovery has been previously provided, Respondent shall comply with the discovery request.

SO ORDERED, this 9th day of November, 1989, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge

*U.S. Government Printing Office : 1992 - 312-335/40156